

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 30 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

THAKARDA KHUDAJI BHIKHAJI

Versus

PRAJAPATI JETHABHAI D.

Appearance:

MR KG SHETH for Petitioners

MR NS SHETH for Respondent No. 1, 2, 3, 4, 5, 6,
7, 8

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 17/11/2000

ORAL JUDGEMENT

1. This appeal arises out of a judgment and decree passed in Regular Civil Appeal No.163 of 1979 by the learned Assistant Judge, Mehsana, at Mehsana. The said appeal arose out of a judgment and decree passed in Regular Civil Suit No.101 of 1975 by learned Joint Civil

Judge (J.D.), Patan, on the 11th September, 1979.

2. The appellants are the original plaintiffs and the respondents are the original defendants. For the said of convenience, the parties are addressed to as "plaintiffs" and "defendants" in this judgment.

3. The suit was preferred by the plaintiffs in respect of properties bearing survey Nos. 24, 25 and 26 of City Tikka No.23/5 of Patan belonging to the ancestors of the plaintiffs. According to the plaintiffs, the properties bearing survey Nos.24 and 25 were sold to the father of the defendants No.1, 2 and 3 by the plaintiffs' ancestors under a registered sale deed dated 5.2.1921. It is contended by the plaintiffs that, northern portion of survey No.26 admeasuring 43 feet east-west and 10 feet north-south situate towards the eastern side of survey Nos.24 and 25 was also sold under the same sale deed. The possession of the said property was handed over to the purchaser. It is the case of the plaintiffs that rest of the land of survey No.26, i.e. southern portion of survey No.26 had remained with the plaintiffs and the defendants had no right, title or interest over the said portion of survey No.26. The plaintiff's case is that they wanted construct a compound in respect of their portion of survey No.26 and, for that purpose, they obtained requisite permission. When they started preparing for the construction, it was objected to by the defendants and a notice dated 8.2.1975 was issued by them. The defendants raised the plea of ownership by adverse possession, etc. in their notice. The plaintiffs, therefore, instituted a suit for declaration of their ownership and for a direction in respect of possession.

3.1 The defendants resisted the suit. They contended in their written statement that they have no knowledge regarding sale and purchase transaction in respect of the suit property. According to the defendants, the plaintiffs were never in possession of any portion of the suit land survey No.26 for at least 50 years prior thereto. That the defendants are in possession of the suit land and have constructed a room and a cattle shed on the southern portion of the suit land for about 20 years. It was also contended that they have already constructed a compound wall. It was contended that the suit is barred by limitation and non-joinder of necessary parties and, therefore, the suit may be dismissed.

3.2 The Trial Court, after framing requisite issues, came to a conclusion that the suit was not barred by

non-joinder of necessary parties. The Trial Court also concluded that the plaintiffs have successfully proved that they were the joint owners of the suit land. It was also held by the Trial Court that the defendants failed to prove that the suit was barred by Limitation act and that they have become owners of the suit land by adverse possession of more than 12 years. The Court observed that the plaintiff is entitled to a decree of declaration and possession as prayed for and, ultimately, allowed the suit and passed judgment and decree in favour of the plaintiff.

4. The defendants aggrieved by the said judgment and decree, approached the District Court with Regular Civil Appeal No.163 of 1979. The case was examined by the First Appellate Court and, ultimately, the appeal came to be dismissed. Aggrieved by the judgments of the Courts below, the original defendant has preferred this second appeal under Section 100 of the Code of Civil Procedure.

4.1 This Court, while admitting the appeal, has formulated the following questions :-

- (1) Whether in the facts and circumstances of the case Lower Appellate Court has substantially erred in law in holding that the appellants-defendants were not the joint owner of the suit land?
- (2) Whether in the facts and circumstances of the case the Lower Appellate Court has substantially erred in law in holding that the appellants defendants have not become the owners of the suit land by adverse possession?
- (3) Whether in the facts and circumstances of the case the Lower Appellate Court has substantially erred in law in holding that the suit is not barred by limitation?

5. Heard learned advocate Mr. K.G. Sheth for the appellants. Mr. N.S. Sheth appears for the respondents.

6. Mr. K.G. Sheth has taken this Court through the record and proceedings. He has read the judgment of the Courts below. According to him, the Courts below have not considered the fact that the defendants have been in possession of the dispute property and that the land was in their actual occupation and use. The defendants had constructed a cattle shed and a hut, which has not been

considered by the Courts below. He submitted that the Courts below have committed an error of not considering the fact that the suit was time barred and that, by virtue of adverse possession, the defendants had become owners of the suit land. He, therefore, urged that the appeal may be allowed.

7. Having regard to the contentions raised by learned advocate for the appellant, it may be stated that it is not possible to accept any of the contentions raised by him. The record and proceedings, if screened, clearly indicate that both the Courts below have closely scrutinized and evaluated the evidence. The Courts below have also properly considered the principle of adverse possession and have come to conclusion that the case of the defendants of having become owners by adverse possession cannot be accepted.

8. The evidence clearly indicates that the plaintiffs' claim of ownership and possession is based on documents of title. The defendants plead total ignorance in respect of such documents and transaction of sale. They claim to be in possession of the property by virtue of their own independent right which they have not been able to establish as against the plaintiffs' who have established their case by cogent documentary evidence. The Courts below have rightly observed that a party cannot claim adverse possession in respect of property owned by him. The adverse possession must be open and hostile to the ownership of the original owner. These ingredients are missing in the instant case. If the defendants are not aware of the sale transaction and if they claim to be in possession of the property in question by virtue of their own ownership, they cannot claim adverse possession in respect of that property. This Court finds no reason to interfere with the concurrent findings of the Courts below.

9. The question of limitation could not have been considered in favour of the defendants in view of the nature of the suit and the contentions raised in the written statement. The suit is based on title and the adverse possession claimed by the defendants is not in real perspective and a claim of adverse possession. A claim of adverse possession goes when he claims to be in possession of the property as owner. Under the circumstances, this Court finds no reason to interfere with the findings of the Courts below. The questions formulated while admitting the appeal are answered in the negative. The appeal stands dismissed with no orders as to costs.

[A.L. DAVE, J.]

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